Nos. 78-658 and 78-678

In the Supreme Court of the United States

OCTOBER TERM, 1978

UTAH POWER & LIGHT COMPANY, PETITIONER

v.

ENVIRONMENTAL DEFENSE FUND, INC., ET AL.

COLORADO RIVER WATER CONSERVATION DISTRICT, ET AL., PETITIONERS

v.

ENVIRONMENTAL DEFENSE FUND, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The order and memorandum of the court of appeals (Pet. App. 19a-22a)[1] are not yet reported. The memorandum opinion and order of the district court (Pet. App. 1a-18a) are reported at 12 Envir. Rep. 1001.

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[1]All "Pet. App." references in this brief will refer to the petition in No. 78-658, unless identified otherwise.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1978. The petition in No. 78-658 was filed on October 18, 1978, and the petition in No. 78-678 on October 20, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the petitioners' motions to intervene were properly denied because their interests were already adequately represented by existing parties.

RULE INVOLVED

Fed. R. Civ. P. 24(a) provides:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT

The Federal Water Pollution Control Act (the Act), 33 U.S.C. 1251 *et seq.*, directs the states and the federal government to take comprehensive action to restore and enhance the integrity of the nation's waters.[2] Section 303 of the Act, 33 U.S.C. 1313, requires the states to adopt water quality standards consistent with the goals of the Act, subject to the approval of the Administrator of the

[2]This comprehensive regulatory program is discussed in *E.I. duPont deNemours & Co.* v. *Train*, 430 U.S. 112, 116-121 (1977), and *EPA* v. *State Water Resources Control Board*, 426 U.S. 200, 202-209 (1976).

Environmental Protection Agency (EPA). Section 303(b) provides that the Administrator shall promulgate satisfactory water quality standards should the states fail to do so. 33 U.S.C. 1313(b). In addition, Section 303 directs the states to develop planning processes designed, among other purposes, to implement the water quality control standards. 33 U.S.C. 1313(e).

The Environmental Defense Fund, Inc. (EDF) brought this action for declaratory, injunctive, and mandatory relief against the Administrator, the Secretary of the Interior, and the Commissioner of the Bureau of Reclamation. EDF alleged that the Colorado River salinity standards, which were adopted by the seven Colorado River Basin states and approved by the Administrator pursuant to Section 303 of the Act, did not comply with the Act. EDF sought an injunction requiring the Administrator to promulgate acceptable water quality standards, implementation plans, and pollutant loads, and directing EPA and Interior to take steps to maintain salinity in the Basin at 1972 levels (Pet. App. 1a-2a). Each of the seven Colorado River Basin states (Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming) sought to intervene as defendants, and the district court granted their unopposed motions (Pet. App. 2a).

Four other motions to intervene were filed by (Pet. App. 2a):

(1) the petitioners in No. 78-678, a group of state and municipal public entities from Colorado (referred to as "Group I");

(2) the Metropolitan Water District of Southern California;

(3) the petitioner in No. 78-658, Utah Power & Light Co.; and

(4) a group of organizations representing a variety of interests in the Basin (referred to as "Group II").

EDF and the federal defendants opposed these intervention motions, though certain of the intervening states supported particular intervention motions.

The district court denied the motions filed by Group I, by the Metropolitan Water District of Southern California, and by Utah Power & Light Co. on the ground that their interests were adequately represented by the states that had already been granted intervention, and that permissive intervention was not warranted (Pet. App. 1a-5a). The court granted Group II's motion for permissive intervention "for the limited purpose of briefing the court on the extent and effect of the various interstate water use compacts in the Colorado River Basin," since none of the parties had proposed to treat this subject in any depth (Pet. App. 15a-16a).

Group I, the Metropolitan Water District, and Utah Power & Light Co. then appealed, moving for summary reversal; the federal appellees and EDF responded with a motion for summary affirmance. The court of appeals summarily affirmed (Pet. App. 19a-22a). It held that under *New Jersey* v. *New York*, 345 U.S. 369 (1953), the would-be intervenors, whose states were already parties, had the burden of showing some compelling interest in their own right that justified intervention, and that they had failed to demonstrate the inadequacy of their states' representation of their interests. Accordingly, the court held that their motions to intervene as of right were properly denied. The court also concluded that the district court had not abused its discretion by denying permissive intervention (Pet. App. 21a n.1).

ARGUMENT

The court of appeals correctly applied established principles to the facts of this case, and there is no occasion for review by this Court.

1. Rule 24(a)(2) of the Federal Rules of Civil Procedure denies intervention as of right to an applicant

whose "interest is adequately represented by existing parties" to the litigation. See *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 537-539 (1972). It is well settled that where, as here, the federal government or a state is a party to litigation, its representation of the interests of its citizens is presumed to be adequate unless special circumstances are shown, and intervention is not permitted unless the applicant can demonstrate some special interest in its own right, distinct from the interests represented by the governmental parties on behalf of their citizens. *New Jersey* v. *New York*, 345 U.S. 369 (1953); *United States* v. *Associated Milk Producers, Inc.*, 534 F. 2d 113, 116-118 (8th Cir.), cert. denied, 429 U.S. 940 (1976); *Commonwealth of Pennsylvania* v. *Rizzo*, 530 F. 2d 501, 505 (3d Cir.), cert. denied, 426 U.S. 921 (1976); *Leech Lake Area Citizens Committee* v. *Leech Lake Band of Chippewa Indians*, 486 F. 2d 888 (8th Cir. 1973); *Illinois* v. *Bristol-Myers Co.*, 470 F. 2d 1276 (D.C. Cir. 1972). See *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689 (1961); *Associated Industries of Alabama, Inc.* v. *Train*, 543 F. 2d 1159 (5th Cir. 1976).[3]

Petitioners urge (78-658 Pet. 10-13; 78-678 Pet. 9-10) that this principle is peculiar to this Court's original cases,

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[3]The general rule is stated in 7A Wright and Miller, *Federal Practice and Procedure* §1909, at 525-529 (1972) (footnotes omitted), as follows:

> At the other extreme are those cases in which * * * there is a party charged by law with representing the interest of the absentee. In these situations representation will be presumed adequate unless special circumstances are shown.* * * This is the controlling principle also when a governmental body or officer is a named party. Thus, for example, in the absence of a very compelling showing to the contrary, it will be assumed that the United States adequately represents the public interest in antitrust suits and in a variety of other matters, that a state adequately represents the interest of its citizens, and that a school board adequately represents the patrons of a school.

such as *New York* v. *New Jersey, supra.* The authorities we have just cited refute this claim. In addition, the opinion in *New York* v. *New Jersey* demonstrates that that decision was founded on the nature of the state's representation as *parens patriae,* not on considerations relevant only to the Court's original jurisdiction. Thus, the Court stated (345 U.S. at 372-373):

> The "*parens patriae*" doctrine, however, has aspects which go beyond mere restatement of the Eleventh Amendment; it is a recognition of the principle that the state, when a party to a suit involving a matter of sovereign interest, "must be deemed to represent all its citizens." *Kentucky* v. *Indiana,* 281 U.S. 163, 173-174 (1930). The principle is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties.

It was on this broad rationale that the Court concluded (345 U.S. at 373):

> An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.

2. Petitioners also contend that they have demonstrated such compelling interests in their own right, and that these interests are potentially adverse to those of their states and cannot adequately be represented by the states. Utah Power urges (Pet. 15-16) that the states' interests are broader and more diverse than those of the utility, and that its interests as a regulated industry are often at odds with the interests of the states that regulate

it. The Group I petitioners, joined by the State of Colorado as *amicus curiae,* similarly argue that the State cannot adequately represent the special interests of the municipalities and water districts.

As the district court concluded, the potential conflicts that petitioners identify are irrelevant to the issues before the district court in this case, and they furnish no basis for intervention.[4] At least at present, this case involves primarily the validity of the salinity standards promulgated by the states and approved by the Administrator of EPA.[5] Petitioners, like the states, urge that the regulations are valid. Accordingly, as the district court observed (Pet. App. 10a), "the interests advanced by these proposed intervenors in upholding the validity of these previously promulgated regulations would appear to be identical with those interests advanced by the states." Since petitioners, like the City of Philadelphia in *New York* v. *New Jersey, supra,* 345 U.S. at 374, "have been unable to point out a single concrete consideration" with respect to which the states' position in the current litigation does not represent the proposed intervenors'

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[4]Petitioners also emphasize (78-658 Pet. 15; 78-678 Pet. 11) that their states support their claim to intervention. See 78-658 Pet. App. 23a-25a; 78-678 Pet. App. 23a-24a. But the states, like petitioners, have suggested no way in which their interests diverge from those of petitioners with respect to this litigation, and the states' agreement that petitioners should be permitted to represent their own interests does not establish petitioners' right to intervene. Indeed, as the court of appeals noted (Pet. App. 22a n.3), it is not surprising that the states welcome the addition of a number of parties who share the states' views.

[5]EDF also seeks to compel the federal respondents to search for alternative ways to deal with the salinity problem, to identify point sources where salinity standards are not met, to establish maximum load levels, to monitor the state planning processes, and to implement water quality standards promulgated by the states (Pet. App. 1a-2a). The federal respondents, the states, and petitioners oppose these claims as well as the primary attack on the salinity standards.

interests, the district court correctly denied intervention.[6] Of course, if the interests of the parties subsequently diverge, the district court may order intervention. See Pet. App. 22a n.3.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] *Trbovich* v. *United Mine Workers, supra,* is not to the contrary. In *Trbovich* the Court concluded that Title IV of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 481 *et seq.*, created private rights in favor of individual union members, as well as a public interest in free union elections. Since these two interests "may not always dictate precisely the same approach to the conduct of the litigation," the Court concluded that the individual union member may intervene in an action brought by the Secretary to enforce both the public and private interests. 404 U.S. at 539. Here, petitioners are not seeking to enforce a statutorily created right. They simply seek to join the states in opposing EDF's claims.

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